

CITY OF SAN JOSÉ, CALIFORNIA
Department of Planning, Building and Code Enforcement
801 North First Street, Room 400
San José, California 95110-1795

STAFF REPORT

Hearing Date/Agenda Number
06/25/03 Item 4.c.

File Number
V03-001

Application Type
Appeal of Director's Decision to Deny a
Development Variance Permit

Council District
6

Planning Area
Willow Glen

Assessor's Parcel Number(s)
264-45-049

PROJECT DESCRIPTION

Completed by: AA

Location: East side of Bird approximately 490 feet northeasterly of Snyder Avenue

Gross Acreage: 0.19

Net Acreage: 0.19

Net Density: 8 units per acre

Existing Zoning: R-1-8

Existing Use: Residential

Proposed Zoning: R-1-8

Proposed Use: To allow a 530 square-foot half-story with a bathroom constructed in an accessory structure without benefit of permits.

GENERAL PLAN

Completed by: AA

Land Use/Transportation Diagram Designation
Medium Low Density Residential (8 DU/AC)

Project Conformance:
☒ Yes ☐ No
☐ See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING

Completed by: AA

North: Single-family residential

R-1-8 Residential

East: Single-family residential

R-1-8 Residential

South: Single-family residential

R-1-8 Residential

West: single-family residential

R-1-8 Residential

ENVIRONMENTAL STATUS

Completed by: AA

☒ Environmental Impact Report found complete
☐ Reuse of Negative Declaration

☒ Exempt
☐ Environmental Review Incomplete

FILE HISTORY

Completed by: AA

Annexation Title: Willow Glen

Date: 10/1/36

PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

☐ Approval
☒ Uphold Director's Decision to Deny

Date:

Approved by: _____
☐ Action
☐ Recommendation

APPLICANT/DEVELOPER

OWNER

Stan Davis
1023 Bird Avenue
San José, CA 95125

PUBLIC AGENCY COMMENTS RECEIVED	Completed by: AA
<p>Department of Public Works</p> <p>None received.</p>	
<p>Other Departments and Agencies</p> <p>See attached Compliance Order dated March 29, 2001, Appeals Hearing Board Resolution #03-054 dated January 23, 2003, and Fire Department memo.</p>	
<p>General Correspondence</p> <p>See attached correspondence from Gail and Vikki Moll dated April 15, 2003, Julie M. Wright dated April 16, 2003, Ruth Wright dated April 16, 2003, Michael Wright dated April 16, 2003, Notice of Permit Appeal Filed by Stan Davis on April 25, 2003.</p>	
ANALYSIS AND RECOMMENDATIONS	

BACKGROUND

The applicant, Stan Davis, is requesting a Development Variance Permit to allow a 530 square foot second-floor, half-story with a bathroom in an accessory structure. The existing zoning is R-1-8 Residence District which allows only single-story accessory structures.

The property is 0.19 gross acres in area, which is characteristic of lot sizes in the neighborhood, and is generally flat and trapezoidal in shape. The project site is developed with a single-family residence used for residential purposes and a detached garage. The existing single-family residence was built in 1876 and is listed on the City's Historic Inventory as a *contributing structure*. The parcel is bounded by single-family residences with rear yard accessory structures to the north, east, south, west.

Permit History

Special Use Permit application File No. SP98-026 allowing modifications to a legal non-conforming historic residence and construction of a 912 square foot accessory structure was submitted in April 1998. Development Variance applications File No. V98-017 allowing the accessory structure to exceed the maximum 16-foot height limit and File No. V98-018 allowing a front perimeter fence in excess of the 3-foot maximum height limit were submitted in July 1998. The applicant indicated a desire to increase the height of the accessory structure to match the roof pitch of the Eastlake Victorian historic residence existing on the site. On August 13, 1998, the Director of Planning approved SP98-026, V98-017 and V98-018 permitting modifications to the residence, a single-story accessory structure 18 feet in height and a front perimeter fence 6 feet in height.

Subsequent to the approval of the above development applications, the applicant applied for building permits and modified the design of the accessory structure to include a pull-down staircase which provided access to an attic storage area in the rafters of the structure. The building plan set did not

include the construction of a floor. Planning staff approved the revised building plans in the context of a plan conformance review.

Code Enforcement History

On March 7, 2001 an advertisement placed on behalf of the applicant in the Willow Glen Resident advertised the subject property for sale and described the property as including a three-car garage with an au paire guesthouse on the second-floor, half story above the garage (see attached).

On March 22, 2001, Code Enforcement received a complaint that a room built over the garage of the subject property was being prepared for illegal occupancy by a tenant. No plumbing, electrical or building permits had been issued to allow the construction of the second floor half story in the accessory structure.

On March 29, 2001, Code Inspector Bouja inspected the subject property and observed that a second-floor, half-story accessed by a permanent staircase with a bathroom, kitchen and wall heater had been added to the garage without permits.

On April 2, 2001 Compliance Order 200105355 (see attached) was issued to the property owner instructing the owner to either demolish or legalize all unpermitted additions/alterations, including the second floor half story in the garage with kitchen and bathroom.

On April 11, 2001, Building Inspector Ted Buryn inspected the subject property and found that the second floor half story of the accessory structure had been converted to an "office" space with a kitchen and bathroom without the required permits.

On January 23, 2002 the Hearings Appeal Board found in Resolution 03-05 (see attached) that the property owner had not complied with the provisions of the Compliance Order and had failed to perform in good faith towards correction of the Municipal Code violations found on the property. Additionally, the Board found that the non-permitted building alterations on the subject property could pose a potential health and safety hazard to the occupants of the subject property and to neighboring properties because the quality of building, electrical, and other related installations could not be verified. The Board ordered that a Development Variance application for the subject non-permitted building alterations be submitted to the Planning Department.

On February 12, 2003 a Development Variance was filed for the subject property. The proposed drawings illustrated a second dwelling unit with bathroom and kitchen on the second floor half story of the accessory unit.

On March 21, 2003 subsequent drawings were submitted that showed a toilet and a sink in separate rooms within the unpermitted second-floor, half story of the accessory structure.

The application indicated that the second-floor, half story of the accessory structure is proposed for a game room or a home office and not for use as a dwelling unit.

On April 16, 2003 the Director of Planning denied the subject Development Variance application.

On April 25, 2003 the applicant filed a Notice of Appeal (see attached).

GENERAL PLAN CONFORMANCE

The proposed modification to the existing rear yard accessory structure on this single-family lot is not consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram Medium Low Density Residential (8 DU/AC) in that a finished second floor in an accessory structure with plumbing and electrical fixtures may easily be converted to a second dwelling unit which would exceed the maximum allowable density in violation of the General Plan Designation.

ENVIRONMENTAL REVIEW

Under the provisions of Section 15303(e) of CEQA this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended in that the project consists of minor modification and conversion of an existing small structure from one use to another.

PUBLIC OUTREACH

Hearing notices were mailed to property owners within 500 feet of the subject property for the April 16, 2003 Director's and the June 25, 2003 Planning Commission Hearing in conformance with the Public Outreach Policy. Staff has attached correspondence received from the public. Staff has been available to discuss the project with members of the public.

ANALYSIS

Zoning Regulations

Title 20 of the Municipal Code (the Zoning Code) includes regulations for the R-1-8 Residence Zoning District in regard to both allowed uses and development standards. The R-1-8 District limits residential uses to one single-family residence per lot. Second units are prohibited. Residential accessory uses are allowed in conformance with the accessory building and structure limitations of Section 20.30.500. The development standards of the R-1-8 District establish a minimum lot size of 5,445 square feet, a requirement for two covered parking spaces, and specific setbacks, height limits, and other standards for both residential structures and accessory buildings.

Section 20.200.010 (A) of the Zoning Code defines an accessory building as follows: "Accessory building" is a separate and subordinate building the use of which is purely incidental to that of the main building and which shall not contain living space, sleeping quarters, or storage space for commercial vehicles requiring additional registration fees as provided for the State Vehicle Code.

An accessory building shall be limited to two (2) plumbing connections to serve an appliance or fixture, and unconditioned space as defined in Title 24 of the San José Municipal Code.” Section 20.200.640 defines “living space” as: “A room designed for living, sleeping, eating or food preparation, including but not limited to a den, study, home office, sewing room or recreational room.” The intent of the Zoning Code regulations regarding accessory structures is to ensure that these buildings are clearly incidental and subordinate to the residence and that the use of accessory buildings, which are located in the rear yard, is not as intense as that of the residence.

Development Variance Application

The subject Development Variance application requests approval of a “second floor attic space for a grandpa’s attic”. The application indicates that the existing half story is being used as a home office and that future plans are for a play area. The plans originally showed what appeared to be a living unit, but were revised to indicate a playroom with a sink and toilet. In terms of physical improvements, the applicant’s proposal is to retain the existing half-story created by installing a floor and a permanent staircase, and to retain electrical service, two plumbing connections/fixtures and the existing heating and air-conditioning systems.

Development Variance Provisions of Title 20

Section 20.100.1300 (1)(a) gives the Director of Planning and the Planning Commission on appeal the authority to grant Development Variances to “... the height, number of stories, frontage, setback, coverage, density, area, off-street parking, fencing, loading and landscaping requirements and regulations of this Title.” Upon making the required findings, the Director or Planning Commission (on appeal) may approve a Development Variance to allow the addition of a half-story to an accessory building. Title 20 provides no authority for a Development Variance that allows an accessory building that does not meet the Zoning Code definition of such a structure [see Section 20.200.010 (A)]; consequently, the proposed Variance cannot approve the use of this structure for an office, play room or other “living space” and cannot authorize retention of existing heating or air condition systems. By definition, an accessory structure cannot contain living space or “conditioned” space (i.e., space that is heated and/or air conditioned).

The Code does allow approval of a Development Variance for an increase in the allowed number of stories based on specific findings. In order to approve a Development Variance for a half-story addition to the subject accessory building, the Planning Commission must make the following findings:

1. The property exhibits special circumstances uniquely applicable to the subject property, such as size, shape, topography, location or surroundings in that the site is characteristic in size and shape with other properties in the immediate area and is generally flat and does not contain any unusual topographic features. Expressly excluded from any consideration are:
 - a. the personal circumstances of the petitioner;
 - b. or of any changes in the size or shape of the subject property made or occurring while the subject property was situate in the zoning district in which it is situate at the time of the filing

of the petition, regardless of whether such changes were caused by the petitioner or his predecessors in interest, the strict application of the requirements and regulations prescribed in this Title and referred to in Subdivision A of Section 20.100.1300, deprives such property of privileges enjoyed by other property in the vicinity of an in same zoning district as the subject property, and

2. The Variance, subject to such conditions as may be imposed thereon, will not impair:
 - a. the utility or value of adjacent property or the general welfare of the neighborhood, and;
 - b. the integrity and character of the zoning district in which the subject property is situate.

Analysis of Variance Findings

Special Circumstances

The subject property is trapezoidal in shape, flat and approximately 8,275 square feet in size. The subject property exceeds the R-1-8 minimum lot size of 5,445 square feet and can accommodate the R-1-8 development standards including setbacks, lot coverage limitations for rear yard accessory structures and required covered parking spaces. The property is characteristic of lots in the surrounding neighborhood in terms of size, topography or shape. The subject property is not unique in terms of size, shape, topography, location or surroundings and does not contain any unique features or special circumstances that would warrant granting a Development Variance for a second-floor, half story in the subject accessory building.

Impair the Value of Adjacent Property or the General Welfare of the Neighborhood

The subject 530-square foot second-floor, half story accessory structure with a permanent staircase and finished interior creates the potential for future use violations, which could result in impacts on surrounding properties. Illegal use of the accessory building could result in overflow parking and generally increase the amount of traffic and activity proximate to the rear yards of surrounding residences.

Integrity and Character of Zoning District

The granting of a Development Variance where there are no unique circumstances that set the property apart from other properties in the same Zoning District, has the potential to undermine the integrity of the District by affording special benefits to one property that are not available to other properties in the Zoning District with similar characteristics. Approval of this Variance to allow a half story with a permanent staircase, may imply that the second floor area can be used as living space, contrary to the specific provisions and overall purpose of the R-1-8 Residence District. Additionally, the second-floor half story is equipped with plumbing and electrical fixtures allowing it to be easily converted to a second dwelling unit which would violate both the allowed General Plan density and the development standards and objectives of the subject Zoning District.

Conclusion

Based on the above analysis, staff concludes that there is no factual basis to support the findings necessary for approval of this Development Variance Permit and that such approval would be detrimental to surrounding properties and to the integrity of the R-1-8 Residence Zoning District.

RECOMMENDATION

Planning Staff recommends the Planning Commission uphold the Director's decision to deny Development Variance Permit and include the following facts and findings in its resolution.

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The proposed site is located in the R-1-8 Residence Zoning District.
2. This site has a designation of Medium Low Density Residential (8 DU/AC) on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
3. The project site is developed with a single-family residence used for residential purposes and a detached garage. The existing single-family residence was built in 1876 and is listed on the City's Historic Inventory as a contributing structure.
4. The project site is 0.19 gross acres in area which is characteristic of the neighborhood, generally flat in nature with little slope, and the shape of the lot is rectangular with the exception that the front lot line is angled and follows the Bird Avenue right-of-way.
5. The surrounding properties are predominantly residential in nature characterized by single-family residences.
6. Special Use Permit application SP98-026 allowing exterior modifications to an historic residence and construction of a 912 square foot accessory structure was submitted in April 1998. On August 13, 1998, the Director of Planning approved SP98-026 permitting a single story 912-square foot three-car garage accessory structure.
7. Development Variance applications V98-017 allowing an accessory structure in excess of the maximum 16 foot height limit and V98-018 allowing a front perimeter fence in excess of the 3-foot maximum height limits were submitted in July 1998. The applicant indicated a desire to increase the pitch and height of accessory structure roof to match the historic Eastlake Victorian architectural style of the existing residence. On August 13, 1998 the Director of Planning approved V98-017 and V98-018 permitting a single story accessory structure 18 feet in height and a front perimeter fence 6 feet in height.
8. On March 7, 2001 an advertisement in the Willow Glen Resident advertised the subject property for sale including a three-car garage with an au paire guesthouse on the second floor above the garage.

9. On March 22, 2001, Code Enforcement received a complaint alleging that a room built over the garage of the subject property was being prepared for illegal occupancy by a tenant.
10. No plumbing, electrical or building permits had been issued to allow modifications to the second floor of the accessory structure.
11. On March 29, 2001, Code Inspector Bouja inspected the subject property and observed that a second floor accessed by a permanent staircase with a bathroom, kitchen and wall heater had been added to the garage without permits.
12. On April 2, 2001 Compliance Order 200105355 was issued to the property owner instructing the owner to either demolish or legalize all unpermitted additions/alterations including the second floor in the garage, kitchen and bathroom.
13. On April 11, 2001, Building Inspector Ted Buryn inspected the subject property and found that the second floor of the accessory structure had been converted to an “office” space with a kitchen and bathroom without the required permits.
14. The applicant alleges that the use of the second story of the accessory structure is for a home office purpose and not for use as a dwelling unit.
15. On January 23, 2002 the Hearings Appeal Board found in Resolution 03-05 that the property owner had not complied with the provisions of the Compliance Order and the owner failed to perform in good faith towards correction of the Municipal Code violations found on the property. Additionally, the Board found that the non-permitted building alterations on the subject property could pose a potential health and safety hazard to the occupants of the subject property and to neighboring properties because the quality of building, electrical, and other related installations could not be verified. The Board ordered that a Development Variance application for the subject non-permitted building alterations be submitted to the Planning Department.
16. On February 12, 2003 a Development Variance was filed for subject property. The proposed drawings illustrated a second dwelling unit with bathroom and kitchen on the second floor of the accessory unit. The application requested approval of a “second floor attic space for a grandpa’s attic”. The application indicated that the existing half-story is being used as a home office and that future plans are for a play area. The applicant proposed to retain the existing half-story created by installing a floor and a permanent staircase, and to retain electrical service, two plumbing connections/fixtures and the existing heating and air-conditioning systems.
17. On March 21, 2003 subsequent drawings were submitted that showed a toilet and a sink in separate rooms on the unpermitted conditioned second floor of the accessory structure and labeled the area as a play room..
18. Section 20.30.100 Table 20-50 limits properties zoned R-1-8 to one one-family dwelling. Second dwelling units are not permitted in the R-1-8 zoning district.
19. Section 20.30.500 Table 20-70 of Title 20 limits accessory buildings to a maximum of one story.

20. Section 20.200.010.A defines an accessory structure as follows: Accessory building is a separate and subordinate building the use of which is purely incidental to that of the main building and which *shall not contain living space*, sleeping quarters, or storage space for commercial vehicles requiring additional registration fees as provided for the State Vehicle Code. An accessory building shall be limited to two (2) plumbing connections to serve an appliance or fixture, and *unconditioned space* as defined in Title 24 of the San José Municipal Code.
21. Section 20.200.640 of Title 20 defines “living space” as: “A room designed for living, sleeping, eating or food preparation, including but not limited to a den, study, home office, sewing room or recreational room.” The intent of the Zoning Code regulations regarding accessory structures is to ensure that these buildings are clearly incidental and subordinate to the residence and that the use of accessory buildings, which are located in the rear yard, is not as intense as that of the residence.
22. An office and a play room constitute “living space” as defined in Title 20. A building with “living space” is not considered an accessory building under the definition of such building provided in Section 20.200.010 (A) of Title 20.
23. Title 20 provides no authorization for the Director of Planning or the Planning Commission on appeal to approve a Development Variance that allows an accessory building that does not conform to the definition of such structure as provided in Section 20.200.010 (A) of Title 20.
24. Approval of this Variance to allow a half story with a permanent staircase, may imply that the second floor area can be used as living space, contrary to the specific provisions and overall purpose of the R-1-8 Residence District. The second-floor half story is equipped with plumbing and electrical fixtures allowing it to be easily converted to a second dwelling unit which would violate both the allowed General Plan density and the development standards and objectives of the subject Zoning District.
25. The subject 530-square foot second-floor, half-story accessory structure with a permanent staircase and finished interior creates the potential for future use violations, which could result in impacts on surrounding properties. Illegal use of the accessory building could result in overflow parking and generally increase the amount of traffic and activity proximate to the rear yards of surrounding residences.
26. The granting of a Development Variance where there are no unique circumstances that set the property apart from other properties in the same Zoning District, has the potential to undermine the integrity of the District by affording special benefits to one property that are not available to other properties in the Zoning District with similar characteristics.
27. The environmental impacts of the project will not have an unacceptable negative effect on adjacent property or properties in that:
 - a. Under the provisions of Section 15301(a) of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California

Environmental Quality Act of 1970, as amended. The project will not have a significant adverse effect on the environment.

FINDINGS

The Planning Commission, based on the facts above, finds the following.

1. The property **does not** exhibit special circumstances uniquely applicable to the subject property, such as size, shape, topography, location or surroundings in that the site is characteristic in size and shape with other properties in the immediate area and is generally flat and does not contain any unusual topographic features. Expressly excluded from any consideration are:
 - a. the personal circumstances of the petitioner;
 - b. or of any changes in the size or shape of the subject property made or occurring while the subject property was situate in the zoning district in which it is situate at the time of the filing of the petition, regardless of whether such changes were caused by the petitioner or his predecessors in interest, the strict application of the requirements and regulations prescribed in this Title and referred to in Subdivision A of Section 20.100.1300, deprives such property of privileges enjoyed by other property in the vicinity of an in same zoning district as the subject property, and
2. The Variance, subject to such conditions as may be imposed thereon, **will** impair:
 - a. the utility or value of adjacent property or the general welfare of the neighborhood, and;
 - b. the integrity and character of the zoning district in which the subject property is situate in that the use of 530 square feet of second floor area in an accessory structure for a home office use impairs the integrity and character of the residential zoning district. The proposed square footage exceeds the allowed 100 square foot limitation of home occupations in accessory structures and the second floor of the accessory structure is not permitted.
3. The proposed project is **not** consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram Medium Low Density Residential (8 DU/AC) in that a finished second floor in an accessory structure with plumbing and electrical fixtures may easily be converted to a second dwelling unit which would exceed the maximum allowable density in violation of the General Plan Designation.

Based upon the above-stated findings, the Planning Commission **denies** the subject Development Variance Permit for a half story in an accessory structure.